FILED

No. 96-96 677 OCT 28 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH CUTLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. MISCHEL
Counsel of Record for Petitioner
Kenneth Cutler
233 Broadway, Suite 3507
New York, New York 10279
(212) 227-7040

12 pp

QUESTION PRESENTED

1. Whether, in light of Zafiro v United States, 113 S.Ct. 933 (1993), Petitioner's motions for a severance, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, based on the contention that the defenses presented by Petitioner and his co-defendants were mutually antagonistic and irreconcilable, were properly denied?

LIST OF PARTIES

In addition to Petitioner Kenneth Cutler, the other parties to the appeal before the United States Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed, were Richard Balter and Chris Oscar DeJesus, appellants, and the Respondent, United States of America.

TABLE OF CONTENTS

PAGE

Questions Presented. i

List of Parties. ii

Table of Authorities iv

Opinion Below. 2

Jurisdictional Statement 3

Statement of Statutes Involved . 4

Statement of the Case. 5

Reasons For Granting The Writ. . 16

Conclusion 29

APPENDIX

Opinion of the United States Court of Appeals For The Third Circuit. 1a

Amended Opinion of The United States Court of Appeals For The Third Circuit. 29a

Judgment of Conviction. 32a

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Bruton v United States,
391 U.S. 123 [1968] 15

Morris v Slappy,
461 U.S. 1 [1983] 26

Opper v United States,
348 U.S. 84 [1954] 17

United States v Applewhite,
72 F.3d 140 [D.C. Cir. 1995]. 22

United States v Barber,
442 F.2d 517 [3d Cir.], cert. denied, 404 U.S. 958 [1971] . 20

United States v Butts,
535 F.Supp. 608
[D.C.Pa. 1982]. 21

United States v Crawford,
581 F.2d 489 [5th Cir. 1978]. 18

United States v DeLuna,
763 F.2d 897 [8th Cir.], cert. denied, 474 U.S. 980 [1985] . 21

United States v Delpit,
94 F.3d 1134 [8th Cir. 1996]. 21

United States v Felton,
592 F.Supp. 172
[D.C.Pa. 1984]. 21

United States v Figueroa,
618 F. 934 [2d Cir. 1980] . . 17

Table of Authorities Cont'd

	PAGE
United States v Garcia Fernandez, 658 F.Supp. 41 [E.D.Pa. 1987]	21
United States v Gonzalez, 804 F.2d 691 [11th Cir. 1986]	18
United States v Harris, 700 F.Supp. 226 [E.D.Pa. 1988]	21
United States v Knowles, 66 F.3d 1146 [11th Cir. 1995]	22
United States v Odom, 888 F.2d 1014 [4th Cir. 1989]	26
United States V Romanello, 726 F.2d 173 [5th Cir. 1984].	18
United States v Rucker, 915 F.2d 1511 [11th Cir. 1990]	18
United States v Serpoosh, 919 F.2d 835 [2d Cir. 1990] .	18
United States v Throckmorton, 87 F.3d 1069 [9th Cir. 1996].	21
United States v Tootick, 952 F.2d 1078 [9th Cir. 1991]	23, 24
United States v Voight, 89 F.3d 1050 [3d Cir. 1996] .	22, 23, 24

Table of Authorities Cont'd

	PAGE
Zafiro v United States, 113 S.Ct. 933 (1993)	13, 15, 16, 17, 18, 19 20, 21, 24, 25, 27, 28

STATE CASES

People v Braune, 363 Ill. 551 [1936]	19

FEDERAL STATUTES

18 U.S.C. §2	2, 5
18 U.S.C. §1341	2, 5
18 U.S.C. §1958	2, 5
28 U.S.C. §1254	3

FEDERAL RULES OF CRIMINAL PROCEDURE

Fed. R. Crim. Pro. Rule 8 . .	4
Fed. R. Crim. Pro. Rule 8(b) .	16, 18
Fed. R. Crim. Pro. Rule 14 . .	4, 18, 19

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

KENNETH CUTLER,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Kenneth Cutler respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Third Circuit, entered on July 29, 1996, which affirmed the judgment of the United States District Court, District of New Jersey (Simandle, J.), entered on October 4, 1994.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 91 F.3d 427, and appears in the Appendix as 1a-31a. The Court of Appeals in its July 29th Order, as amended August 16th, affirmed the judgment of the United States District Court, District of New Jersey, convicting Petitioner Cutler of murder-for-hire, in violation of 18 U.S.C. §§1958 and 2, and mail fraud (three counts), in violation of 18 U.S.C. §1341 and 2, and sentencing him, pursuant to the United States Sentencing Guidelines, to the custody of the Bureau of Prisons, for life, on the murder-for-hire conviction, and for sixty months on each of the three mail fraud convictions, all to be served concurrently.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

The Order of the Court of Appeals sought to be reviewed was filed on July 29, 1996.

The Petition for Writ of Certiorari is filed within the time prescribed by U. S. Sup. Ct. Rule 13, 28 U.S.C.A.

FEDERAL RULES INVOLVED

Fed. R. Crim. Pro. Rule 8

> "(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. Pro. Rule 14

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

STATEMENT OF THE CASE

By Superseding Indictment Number 93-536, Kenneth Cutler (Petitioner) was accused by a federal grand jury of committing the crimes of murder-for-hire, in violation of 18 U.S.C. §§1958 and 2, and mail fraud (six counts), in violation of 18 U.S.C. §1341 and 2. Named as co-defendants in Count One, alleging murder-for-hire, were Richard Balter, Manual Garcia, and Chris Oscar DeJesus. Balter was also named as a co-defendant in the six mail fraud counts.

After a six week jury trial beginning in May, and continuing to the end of June, 1994, Petitioner and his three co-defendants were found guilty of murder for hire. Petitioner and co-defendant Balter were also found guilty of three counts of mail fraud. The other three mail fraud counts were dismissed after the government rested its case.

In March, 1993, Robert Cohen died as a result of complications arising from multiple gunshot wounds, having been gunned down some six weeks earlier in front of his place of business, Uneeda Manufacturing Corporation (Uneeda), located on Jerome Avenue, Bronx, New York. A joint federal/state investigation ensued which, after a prime suspect, Gustavo Gil, agreed to cooperate with the government, in return for substantial charging and sentencing concessions, culminated in the arrests of Petitioner and the three co-defendants in or about November, 1993.

The government's theory was that, through Gus Gil, co-defendant Balter and "his right hand man", Petitioner, hired and paid "two assassins", co-defendants Manuel Garcia and Chris Oscar DeJesus, to murder Robert Cohen. The motive for the murder, according to the government, was "financial gain", i.e., Cohen's company (Uneeda) owed

co-defendant Balter's New Jersey based company, Northeastern Poly Products (Northeastern), some $600,000 for merchandize sold to Uneeda by Northeastern. To secure the debt, and show his good faith to co-defendant Balter, Cohen arranged for a life insurance policy to be written in the amount of $600,000, naming Cohen as the insured and co-defendant Balter as the beneficiary. However, because financial pressures mounted at Northeastern because of an economic slow-down and Uneeda's inability to reduce its enormous debt to Northwestern, co-defendant Balter and Petitioner had Cohen murdered (making the homicide appear to be drug-related to deflect attention from them), hoping to satisfy the debt through the proceeds of the insurance policy on Cohen's life.

From the outset of the proceedings, Petitioner and his co-defendants adverted to substantial tensions existing among them

arising from their respective defenses. In essence, co-defendant Balter's defense (established through cross-examination of the government's witnesses since he did not testify) was that "he had nothing to do with this crime" (Tr. 2510); rather, it was Petitioner, assisted by Gus Gil, who orchestrated the murder, and then manipulated co-defendant Balter so as to make it appear as though he was responsible for the crime. In this regard, co-defendant Balter claimed that he was being extorted by the persons who murdered Robert Cohen, including Petitioner.

Petitioner acknowledged that he introduced Gil, a long-time acquaintance, to co-defendant Balter, but that it was co-defendant Balter and Gil who planned and arranged for Cohen's murder at the hands of co-defendants Garcia and/or DeJesus. Unlike his co-defendants, Petitioner testified and was subjected to searing

cross-examination by what was in effect a second (perhaps more effective) prosecutor, i.e., co-defendant Balter's counsel.

In short, Petitioner's defense was that he was not an accessory to murder but at most may have been an accessory-after-the-fact in that he participated in the "cover-up" of the murder by co-defendant Balter and Gil because he feared them both.

Co-defendants Garcia and DeJesus each contended that Gus Gil was the shooter and that they (Garcia and DeJesus) were "ripping these guys off", i.e., Balter and Gil, for the money (Tr. 2257-58).

Because of the obvious tensions among them, numerous motions were made pretrial and during the trial for severance and for the empanelment of multiple juries. To this end, both Petitioner and Balter argued that their joint trial deprived them of their fair trial rights because their defenses were not only mutually

antagonistic (which they recognized does not per se require severance) but were in fact irreconcilable. They also argued that their respective abilities to present a defense, and to confront and cross-examine witnesses, was limited by the district court's rulings which were designed to protect against the potential for prejudice to them or to co-defendants Garcia and DeJesus. The district court denied the several motions.

Among the many arguments for severance made by counsel is the following by counsel for co-defendant Balter:

> "In a nutshell our defense on behalf of Mr. Balter clearly is that he is the victim of an extortion plot. *** We will open on it, we will sum up on it, and the jury will decide Richard Balter's fate based upon our defense.
>
> In a nutshell, I believe that [Petitioner's] defense *** will be a variation on an obstruction of justice, knowledge after the fact cover-up, which would in essence admit accessorial liability.

***

[Petitioner's] defense would cut drastically against the extortion theory. Number one, for the extortion theory to be cohesively presented it requires that both Mr. Cutler and Mr. Balter be in the same shoes, and that is not the defense that [Petitioner] is prepared to offer. Number two, it is [Petitioner's] defense. Also, [he] admits that Mr. Balter was involved in a murder conspiracy.

And, although the case law allows for a certain amount of antagonism, when you combine that antagonism with the fact that logically it just doesn't make any sense that Mr. Balter's defense is extortion, [Petitioner's] defense is that he found out about the murder conspiracy to kill Robert Cohen after the fact, when you combine those two, it creates a tremendous amount of confusion, and it will create, I predict, an atmosphere in the courtroom that will have defense counsel at each other's throat, which the case law points to as a factor.

***

So I would simply conclude, your Honor, by saying that there is certainly in this case, a high risk of an unreliable jury determination, given the interlocking confusion that can be created by four defense lawyers proffering clearly different and antagonistic, at odds defenses in one courtroom in

> one trial. And I would ask your Honor to fashion a severance package on behalf of Mr. Balter" (Joint Appendix to Appellants' Briefs, 331A-B, 331F, 331L).

By the end of the trial, Petitioner's counsel remarked on summation that,

> "I'm responding to two closing arguments *** At times I couldn't tell whether *** [counsel for co-defendant Balter] was trying to acquit Mr. Balter or convict Mr. Cutler.
>
> ***
>
> I submit to you that what you've seen in this courtroom for the last six weeks culminating in the cross-examination of Mr. Cutler and the closing argument by [co-defendant Balter's counsel] is Richard Balter's plan. This was his plan. Step one is kill Bob Cohen and collect the insurance money, if you can get away with it. And if you can't get away with it, point the finger at someone else. And he's been setting that table since September of 1992. If you come in here and you testify against Rick Balter you get attacked" (Trial Trans., 4060).

On appeal to the Third Circuit, the court rejected Petitioner's arguments that "they had 'mutually antagonistic defenses' at trial and that the district court

therefore erred in failing to grant their repeated motions for a severance" (8a). The court, relying on Zafiro v United States, 113 S.Ct. 933 (1993), explained that,

> "in this case, although Balter and Cutler maintain that they had mutually antagonistic defenses at trial, they have not identified any specific trial rights that were compromised by the joint trial; nor have they demonstrated that the joint trial impeded the jury from making a reliable judgment about guilt or innocence. Accordingly, we find no abuse of discretion on the part of the trial judge in denying their severance requests" (10a).

Regarding Petitioner's specific arguments concerning severance, the court rejected his "'second prosecutor'" contentions directed at co-defendant Balter's counsel, noting that Petitioner's arguments depended on pre-Zafiro cases for their vitality (11a) and that, since Zafiro, there have been no cases reversing

convictions "on the basis of this theory" (11a-12a).

The court also dismissed Petitioner's specific claim of prejudice that, to prevent undue prejudice to co-defendant Balter, the district court precluded the wholesale admission of evidence tending to establish that co-defendant Balter may have engaged in multiple uncharged criminal acts over a period of years as a means of raising money for himself. To this end, the district court fashioned a remedy providing for limited admission which the Court of Appeals noted Petitioner ultimately agreed to (12a).

Finally the Court of Appeals rejected Petitioner's arguments that, as a compromise measure, multiple juries should have been empaneled (12a-13a, n.2). The court reasoned that, because severance was not mandated, no need for multiple juries was demonstrated. Moreover, the court

reasoned, multiple juries have been reserved "almost exclusively" for Bruton situations.[1] The court added that the authorities cited by Petitioner for the proposition that "multiple juries have been used in cases of mutually antagonistic defenses" (13a, n2), antedated Zafiro and in any event "were the exception even when they were decided. Because [Petitioner] cannot show a Bruton problem or any other prejudice, his motion [for a severance or the empanelment of multiple juries] was properly denied" (13a, n2).

---

[1] Bruton v United States, 391 U.S. 123 (1968).

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL ISSUE AFFECTING THE FAIR ADMINISTRATION OF JUSTICE IS PRESENTED IN THAT THE THIRD CIRCUIT HAS IN EFFECT READ ZAFIRO V UNITED STATES, 113 S.Ct. 933 (1993) TO MEAN THAT IRRECONCILABILITY BETWEEN DEFENSES DOES NOT UNDER ANY CIRCUMSTANCES MANDATE SEVERANCE.

In relevant part, Rule 8(b) of the Federal Rules of Criminal Procedure permits joinder of two or more defendants in the same accusatory instrument, and their joint trials,

> "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Rule 8(b) states a preference in the federal system for joint trials who are indicted together (Zafiro v United States, supra, 113 S.Ct., at p938). This is because,

> "[j]oint trials 'play a vital role in the criminal justice system' ***. They promote efficiency and 'serve the interest of justice by avoiding the scandal and inequity of

> inconsistent verdicts'" (Zafiro v United States, supra, 113 S.Ct. at p938).

However, as was noted by the Second Circuit in United States v Figueroa, 618 F. 934, 938 (2d Cir. 1980), there are limits to judicial economy and the amount of prejudice a defendant must endure for the sake of judicial economy.

Rule 14 of the Federal Rules of Criminal Procedure provides that,

> "[i]f it appears that a defendant *** is prejudiced by a joinder of *** defendants in an indictment *** or by such joinder for trial together, the court may *** grant a severance of defendants or provide whatever other relief justice requires."

Rule 14 severance motions are addressed to the district court's sound discretion (see Opper v United States, 348 U.S. 84, 95 [1954]). In Zafiro, this Court, recognizing that "[t]he risk of prejudice will vary with the facts in each case, and district courts may find

prejudice in situations not discussed here" (113 S.Ct., at p938), observed that,

> "When defendants properly have been joined under Rule 8(b), a district should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence" (113 S.Ct., at p 938).

Severance, though sparingly used, has been ordered in cases where defendants presented mutually antagonistic or irreconcilable defenses (see e.g. United States v Serpoosh, 919 F.2d 835 [2d Cir. 1990]; United States v Rucker, 915 F.2d 1511 [11th Cir. 1990]; United States v Gonzalez, 804 F.2d 691 [11th Cir. 1986]; United States V Romanello, 726 F.2d 173 [5th Cir. 1984]; United States v Crawford, 581 F.2d 489 [5th Cir. 1978]). In Zafiro, this Court declined the petitioners' invitation "to adopt a bright line rule, mandating severance whenever co-defendants

have conflicting defenses", broadly stating that,

> "[m]utually antagonistic defenses are not prejudicial per se. Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's discretion" (113 S.Ct., at pp 937-38).

Concurring in the judgment, Justice Stevens expressed dissatisfaction with the broader implications of Zafiro's holding (113 S.Ct., at pp 940-41), particularly since, in his view, "the defenses presented in this case did not rise to the level of mutual antagonism" (113 S.Ct., at p939). Justice Stevens commented that,

> "I would save for another day evaluation of the prejudice that may arise when the evidence of testimony offered by one defendant is truly irreconcilable with the innocence of a co-defendant. Because the facts here do not present the issue squarely, I hesitate in this case to develop a rule that would govern the very different situation faced in the cases like People v Braune, 363 Ill. 551,

> 557, 2 NE.2d 839, 842 (1936), in which mutually exclusive defenses transform a trial into 'more of a contest between defendants than between the people and the defendants.' Under such circumstances, joinder may well be highly prejudicial, particularly when the prosecutor's own case-in-chief is marginal and the decisive evidence of guilt is left to be provided by a co-defendant" (113 S.Ct., at p940).

In rejecting Petitioner's claims, the Third Circuit was apparently persuaded that the Zafiro Court had announced a new rule governing severance in cases where mutually antagonistic defenses had been presented. However, as revealed by an examination of the pre-Zafiro cases discussing the subject, including cases in the Third Circuit (see United States v Barber, 442 F.2d 517, 529 [3d Cir.], cert. denied, 404 U.S. 958 [1971]) case law did not require severance where mutually antagonistic defenses were presented; rather, it was apparently understood in the Third Circuit

that it was to be left to the district court to fashion an appropriate remedy, if needed (see e.g., United States v Harris, 700 F.Supp. 226, 232 [E.D.Pa. 1988]; United States v Garcia Fernandez, 658 F.Supp. 41, 43 [E.D.Pa. 1987]; United States v Felton, 592 F.Supp. 172, 195 [D.C.Pa. 1984]; United States v Butts, 535 F.Supp. 608, 610 [D.C.Pa. 1982]).

Since Zafiro, the federal courts of appeals have continued to recognize that "'[a]ntagonistic' defenses require severance only when 'there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty' "(United States v Delpit, 94 F.3d 1134, 1143 [8th Cir. 1996] [emphasis in original], quoting United States v DeLuna 763 F.2d 897, 921 [8th Cir.], cert. denied, 474 U.S. 980 [1985]; see also, United States v Throckmorton, 87 F.3d 1069, 1072 [9th Cir. 1996]; United States v

Applewhite, 72 F.3d 140, 142 [D.C. Cir. 1995]; United States v Knowles, 66 F.3d 1146, 1159 [11th Cir. 1995]).

Indeed, in United States v Voight, 89 F.3d 1050, 1094-95 (3d Cir. 1996) -- decided some three weeks before Petitioner's conviction was affirmed, a different panel of the Third Circuit at least theoretically recognized the continued viability of irreconcilable defenses as a basis for severance. The court said that,

> "[m]any courts have recognized that [serious risk of prejudice] arises when codefendants assert 'mutually antagonistic' defenses.
>
> ***
>
> Although precise articulations may differ, courts agree that '[m]utually exclusive defenses ... exist when acquittal of one codefendant would necessarily call for the conviction of the other.' ***. This type of situation arises 'when one person's claim of innocence is predicated solely on the guilt of a co-defendant.' *** In determining whether mutually antagonistic defenses exist such that severance may be

> required, the court must ascertain whether 'the jury could reasonably construct a sequence of events that accommodates the essence of all appellants' defenses.' ***.
>
> While mutually antagonistic defenses have been much discussed in theory, only rarely have courts found that they exist in practice. *** Far more frequently, courts have concluded that the asserted defenses, while in conflict with one another, are not so irreconcilable that '[t]he jury could not have been able to assess the guilt or innocence of the defendants on an individual and independent basis.'
>
> ***
>
> Moreover, courts have consistently held that fingerpointing and blame shifting among coconspirators do not support a finding of mutually antagonistic defenses [citations omitted]. These cases illustrate the well-settled principle that 'defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials' [citation omitted])."

Curiously, the panel in Voight cited United States v Tootick, 952 F.2d 1078 (9th Cir. 1991) without questioning its current vitality, yet the panel in Petitioner's case suggests that Tootick (which

Petitioner in part relied upon to establish the requisite prejudice for severance) has been substantially undercut by Zafiro.

In any event, the model for irreconcilable defenses mandating severance, seemingly embraced by the Third Circuit in Voight, and by the other courts of appeals cited ante, pp 21-22, is present in the case at bar. Petitioner and co-defendant Balter were jointly tried for the murder of Robert Cohen with the persons, according to the government, who actually committed the murder, co-defendants Chris Oscar DeJesus and Manuel Garcia. The link between the two sets of defendants was Gus Gil, who was cooperating with the government.

According to co-defendant Balter, the murder was planned by Petitioner and Gus Gil, and carried out by co-defendants DeJesus and Garcia. After the murder was

committed, Balter contended, Petitioner, Gil, and co-defendants DeJesus and Garcia, were making it appear as though he was responsible for the crime and, to this end, were extorting him.

Petitioner's defense was that, though he introduced long-time acquaintance Gus Gil to co-defendant Balter, it was Gil and co-defendant Balter who planned the murder, and hired co-defendants DeJesus and Garcia to execute the plan, all of which he (Petitioner) learned after Robert Cohen had been fatally shot. Petitioner acknowledged that he cooperated with co-defendant Balter and Gus Gil in the cover-up after the crime was committed, but did so only because he feared them.

In addition to the prejudice to be expected from irreconcilable defenses, co-defendant Balter's trial counsel fulfilled Justice Stevens' prophecy in Zafiro (113 S.Ct., at p940), i.e., that he in effect

became a "second prosecutor" or Petitioner's "most forceful adversary". Consistent with his promise "to paint as sinister a picture of [Petitioner] as I can" (Joint Appendix, p911), co-defendant Balter's trial counsel's attack on Petitioner was "unrelenting" - counsel's "tactic was to bring out any information that was detrimental and prejudicial to [Petitioner] without regard to whether such information was relevant to the charges contained in the indictment" (United States v Odom, 888 F.2d 1014, 1018 [4th Cir. 1989]).

Among the factors cited by the district court for denying severance to Petitioner was the inconvenience to witnesses having to return to court to testify, which has in general been judicially recognized as a legitimate concern (see Morris v Slappy, 461 U.S. 1, 14-15 [1983]). To accommodate this

concern, and to alleviate the obvious prejudice stemming from a joint trial, Petitioner advocated the empanelment of multiple juries. Affirming the district court, the Third Circuit again adverted to the fact that the cases cited by Petitioner in support of multiple juries antedated Zafiro (12a-13a, n.2). However, nothing in Zafiro even remotely suggests that multiple juries should be limited to "Bruton situations".

By drawing a line between pre-Zafiro and post-Zafiro cases, the Third Circuit has suggested that the Court announced a new rule of procedure to be followed in assessing motions to sever, and that defendants are now under a higher burden to establish that severance is warranted. Rather than adopting a new rule, the Court reaffirmed that mutually antagonistic defenses are not per se prejudicial, and that depending upon the particular facts of

each case, the district court will determine the appropriate remedy to protect against any prejudice arising from joinder (Zafiro, 113 S.Ct. at p938).

Certiorari should be granted to review the issues presented given their importance to the fair administration of justice.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
October 28, 1996

Respectfully submitted,

RICHARD E. MISCHEL, P.C.
Attorney for Petitioner
Kenneth Cutler
233 Broadway, Suite 3507
New York, New York 10279
(212) 227-7040

Richard E. Mischel,
of counsel